No. 09-398

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE STATE OF LOUISIANA,

Petitioner,

v.

DONALD W. ABSHIRE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the petition where the Petitioners' CAFA issue is premised on an unresolved issue of state law, which is whether Louisiana Code of Civil Procedure article 595(A) creates a substantive right to a new claim for attorneys' fees.

2. If so, whether Petitioners have presented compelling reasons to grant the petition where there is no conflict among the Circuit Courts arising from the use of relation-back analysis in determining if a post-CAFA amendment to a pre-CAFA state court petition gives rise to a second commencement date.

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STATEMENT OF THE CASE

In December of 1991, Respondents filed this case in state court as a cumulated civil action on behalf of over 1,000 individual owners of annuities, life insurance policies, and corporate notes purchased from three Louisiana companies: Public Investors Life Insurance Company, Public Investors Incorporated, and Midwest Life Insurance Company. Respondents allege misconduct by the State of Louisiana, by and through the Department of Insurance and the Office of Financial Institutions, for allowing improper transfers of funds out of the companies in which the Respondents had invested, causing these companies to collapse.[1]

At the time of commencement of the litigation, many of the Respondents were elderly. Over the approximately eighteen years of this litigation, many have passed away, have otherwise become incapacitated, or have been displaced from their homes due to Hurricanes Katrina and Rita which struck Louisiana in 2005. Understandably, communication with all named plaintiffs became more difficult. In 2006 and 2007, when settlement discussions arose, Respondents submitted a request for an opinion to the Ethics Advisory Service Committee of the State Bar of

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[1] This is a case arising from the corrupt regime of Douglas D. Green, Commissioner of Insurance of the State of Louisiana during the 1990s. For a glimpse of the tortuous background of the circumstances surrounding his tenure as Commissioner of the Louisiana Department of Insurance, *see United States v. Green*, 964 F.2d 365 (5th Cir. 1992).

Louisiana ("Ethics Committee") to determine if Respondents' counsel had sufficient authority to accept a settlement offer on behalf of Respondents.[2] As required by state ethics rules, counsel for the Respondents then filed a motion to withdraw as counsel for the 243 Respondents with whom counsel had lost communication over the prior sixteen years of litigation. After the state trial judge denied the motion, and in light of the opinion issued by the Ethics Committee,[3] Respondents amended their petition on May 30, 2008, with leave of the court, merely changing the procedural vehicle of the case from a consolidated direct action to a class action.[4] The amended petition did not include a new claim for recovery of statutory attorneys' fees, as alleged by Petitioners. Louisiana procedural rules require fact pleading. All petitions in this matter have included a prayer for

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[2] *See* Appendix ("App.") 1. At inception of this case, a committee comprised solely of Plaintiffs was formed. That committee possessed a power of attorney for each client's claim in order to make decisions for each client, including the authority to settle and release all claims. No member of Plaintiffs' counsel was a member of this committee.

[3] *See* App. 6.

[4] *See* App. 16. On August 2, 2007, counsel for Respondents submitted a letter to Judge Bates of the 19th Judicial District Court, State of Louisiana, in which this case is pending, delineating the options available to Respondents, given the communication difficulties and the recently issued opinion by the Ethics Committee, for effectuating settlement or other resolution of the case. Judge Bates then indicated that conversion to a class action could be an appropriate procedural vehicle for the case.

attorneys' fees to the extent such an award may be allowable under any applicable Louisiana substantive law.[5] Louisiana Code of Civil Procedure ("La. CCP") article 595(A), as a procedural statute that does not confer any independent right to recover attorneys' fees, was not specifically pleaded as a substantive grant for recovery of attorneys' fees.

Petitioners then removed the case to the United States District Court for the Middle District of Louisiana, asserting federal question jurisdiction pursuant to the Class Action Fairness Act ("CAFA").[6] Respondents moved to remand the case, and on January 7, 2009, the United States District Court for the Middle District of Louisiana granted the motion, adopting Magistrate Judge Riedlinger's Report in its entirety. Upon appeal by the Petitioners, the Fifth Circuit Court of Appeals affirmed the District Court's remand of the case to state court for lack of federal jurisdiction. The Fifth Circuit held that the amended

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[5] All prior amendments to the petition in the instant action have been legally proper. Plaintiffs amended their petition five times in the first year of litigation to add new plaintiffs. All subsequent amendments, including the Ninth Amended Petition, have been made with express leave of the court.

[6] 28 U.S.C. § 1332(d). This is Petitioners' second unsuccessful attempt at removal. *See* App. 21 for a graphic representation of Petitioners' forum-shopping tactics in this case; *see also* App. 24 for evidence of Petitioners' admission of forum shopping. The complete recording of the April 28, 2009 oral argument is available from the Fifth Circuit at http://www.ca5.uscourts.gov through the Oral Arg. Recordings Page (pertinent portion begins at minute 50:23).

Complaint did not include a new claim. Although unnecessary to the outcome, the Fifth Circuit also performed a federal and state relation-back analysis, finding alternative bases under both the federal and state relation-back tests to support its decision to remand the case to state court.

REASONS FOR DENYING THE PETITION

Petitioners present no compelling reasons for their Petition for a Writ of *Certiorari* ("Petition") to be granted. Specifically, Petitioners fail to demonstrate that La. CCP article 595(A) creates a new statutory claim for attorneys' fees substantial enough to constitute a second commencement date in this litigation, or that the Fifth Circuit's July 2, 2009 Opinion is in conflict with any other Federal Circuit. The Petition should be denied.

A. The non-retroactivity of CAFA makes this a case of limited precedential value.

Section 9 of CAFA specifies that "this Act shall apply to any civil action commenced on or after the date of enactment of this Act."[7] In drafting the statute, Congress specifically rejected a proposal to authorize removal for an action "certified" as a class

[7] Pub.L. 109-2, § 9, 119 Stat. 14. CAFA was enacted on February 18, 2005.

action after the date of enactment.[8] Thus, Congress purposefully did not make CAFA applicable to civil actions in which a motion for class certification is filed after enactment of the statute, such as the instant case. CAFA is only applicable to civil actions commenced on or after February 18, 2005.[9]

Cases that were originally filed pre-CAFA and converted to class actions post-CAFA are exceedingly rare as it is, and are becoming more so as CAFA ages. A Supreme Court decision regarding CAFA jurisdiction in this case would have *de minimus* precedential value, given that it would apply only to lawsuits filed as direct actions in state court prior to February 2005 that were converted to class actions after February 2005.

Federal courts have uniformly held that state law determines the date on which a lawsuit initially filed in state court is "commenced" under CAFA.[10]

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[8] *Compare* H.R. 516, 109th Cong. § 7 (2005) (providing, in the original House bill, for removal in cases where a class certification order is entered after CAFA's enactment date), *with* Class Action Fairness Act of 2005, Pub.L. 109-2, § 9, 119 Stat. 14 (containing no such language).

[9] Given the Fifth Circuit's statutory construction of CAFA that "[a] 'civil action' may commence before it becomes a 'class action'," the addition of class allegations alone does not commence a new civil action for the purposes of CAFA. Petition Appendix ("Petition App.") at 11a-12a.

[10] Petition App. at 10a; *Braud v. Transp. Serv. Co. of Ill.*, 445 F.3d 801, 803-04 (5th Cir. 2006); *see also, Plubell v. Merck & Co.*, 434 F.3d 1070, 1071 (8th Cir. 2006); *Pritchett v. Office*

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Under Louisiana law, a suit is commenced by filing a pleading presenting a demand to a court of competent jurisdiction.[11] This case was filed in state court on December 11, 1991, thirteen years before the enactment of CAFA. As recognized by the Circuit Courts, certain exceptions exist where federal courts have determined that a second commencement has taken place for the purposes of CAFA, namely, the addition of new defendants and the addition of certain new claims.[12] Here, Petitioners argue that the conversion of the instant action from a consolidated direct action to a class action gives rise to a new statutory claim for attorneys' fees pursuant to La. CCP article 595. The District Court and the Fifth Circuit correctly found that this case should be remanded because the amendment at issue did not dramatically change the character of the litigation such that the case should be deemed to have commenced anew.

B. La. CCP article 595(A) does not present an issue that should be decided by the United States Supreme Court.

The Petitioners' questions presented are classic examples of begging the question. Petitioners offer a

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Depot, Inc., 420 F.3d 1090, 1094 (10th Cir. 2005); *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 806 (7th Cir. 2005); *Natale v. Pfizer, Inc.*, 424 F.3d 43, 44 (1st Cir. 2005); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 684, 686-87 (9th Cir. 2005).

[11] La. CCP article 421.

[12] *See* cases cited *infra* at note 32.

discredited proposition claiming a new state statutory authority for attorneys' fees disguised as an argument about CAFA's commencement date. Petitioners' claim that CAFA confers jurisdiction in this case is premised on the assumption that La. CCP article 595(A) creates a new substantive claim for attorneys' fees as part of a damage award in a Louisiana class action lawsuit. It clearly does not.[13] This High Court is not the forum to resolve this issue of state law that has no national or constitutional implications.

The pertinent language of article 595 is clear: "The court may allow the representative parties their reasonable expenses of litigation, including attorneys' fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class."[14] Petitioners argue that "Louisiana law gives courts the power to award attorneys' fees and costs by statute," referencing article 595.[15] However, the unambiguous language of the statute belies this argument. As explained by Magistrate Judge Riedlinger in his report recommending remand of this case, "The eligible sources of the art. 595(A) fees are only the common fund or other benefits made available to the class by the class action, and [article 595(A)] 'does not authorize the

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[13] "A class action is a procedural device only and does not confer substantive rights." *Husband v. Tenet Healthsystems Mem'l Med. Ctr., Inc.*, 2009 WL 2480082, at *5 (La. App. 4th Cir. 2009).

[14] La. CCP article 595(A).

[15] Petition at 7.

court to assess attorney's fees to the class action defendant'."[16] The legislative history of La. CCP article 595(A) supports Judge Riedlinger's conclusion. La. CCP article 595 is modeled on Federal Rule of Civil Procedure ("FRCP") 23 which does not create a substantive right for class action plaintiffs to recover attorneys' fees from defendants.[17]

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[16] Petition App. at 50a, *citing Grant v. Chevron Phillips Chem. Co., L.P.*, 309 F.3d 864 (5th Cir. 2002); *see also Harrison, et al. v. Union Carbide Corp., et al.*, 1995 WL 555616, at *2 (E.D. La. 1995) ("[La. CCP article 595] does not compel the defendants to pay any attorney's fees over and above the amount of damages awards").

[17] *Wright, Miller and Cooper,* Federal Practice and Procedure Civil 3d § 1803; *see Brooks v. Union Pac. R.R. Co., et al.*, 13 So.3d 546, 555 (La. 2009) (La. CCP articles 591-597 were adopted from FRCP 23); *see also Robichaux v. State Dep't of Health and Hosps.*, 952 So.2d 27, 33 n.7 (La. App. 1st Cir. 2006) (In 1997, the Louisiana legislature revised Louisiana's class action provisions to track the language of FRCP 23). Although the 1997 amendments were declared non-retroactive, the language of La. CCP article 595 was not changed by those amendments; therefore, the issue of retroactivity of the amendments is irrelevant to the application of La. CCP article 595. La. CCP article 595 (1991); La. CCP article 595 (1998); La. CCP article 595 (2008); La. CCP article 595 historical and statutory notes (1998) ("Pursuant to the statutory revision authority of the Louisiana State Law Institute, in 1997, the paragraphs of this article were designated as pars. A and B"; therefore, the only change to La. CCP article 595 by the 1997 amendments was to specifically designate the paragraphs of this article); La. CCP article 595 historical and statutory notes (2008) (This note is identical to the historical and statutory note to La. CCP article 595 (1998) indicating no subsequent revisions were made to this article).

In *Grant v. Chevron Phillips Chemical Company*, the Fifth Circuit, in determining that attorneys' fees pursuant to article 595(A) can be included in calculating the amount in controversy for federal diversity jurisdiction, analyzed article 595 as merely a fee shifting statute.[18] In an opinion authored by Judge Wiener, the Fifth Circuit explained that "the shifting is not between the class and the defendant. Instead, the shifting is between the class representatives and the rank and file members of the class."[19] On the particular issue presented in the instant case, Judge Wiener, in *Grant*, notes, "The question whether the court can assess attorney's fees to the class action defendant on the strength of art. 595(A) alone need not be answered for our purposes today, so we leave it to another day, preferably to a Louisiana court."[20] Thus, as recognized by the Fifth Circuit, the issue currently before the Court hinges on an interpretation of state law that should be made by a Louisiana state court.

Petitioners erroneously cite to *Grant* as the basis for their argument that "[i]f Louisiana statutory attorneys' fees under article 595 can be used for calculation of the amount in controversy, then it stands that such fees must be considered a new claim which would open a removal window for purposes of CAFA

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[18] *Grant*, 309 F.3d at 872, 876.

[19] *Id.* at 872.

[20] *Id.* at 872 n.27.

jurisdiction."[21] In the *sub judice*, Judge Wiener refused to make the unfounded leap in reasoning requested by Petitioners and found that this case does not fall within the jurisdiction of CAFA regardless of the outcome of the article 595 issue.[22] There is no reason for this Court to further entertain the issue.

The Eastern District of Louisiana has found:

> La. C. Civ. Proc. 595 allows the court to designate a certain amount of a specific fund to be awarded as attorney's fees and does not compel the defendants to pay anything over and above the amount of compensatory damages awarded. Louisiana's class action law does not require the defendant to pay one dime in attorneys' fees, it merely gives the trial court the power to designate how much of the final pie the named plaintiffs' attorneys shall receive as fees.[23]

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[21] Petition at 9.

[22] In *Grant*, the Fifth Circuit determined that "[t]he way that art. 595(A) harmonizes Louisiana's attorneys' fees rules in the context of class actions is by empowering, without mandating, the court to 'allow' attorneys' fees to class representatives from funds or other sources of recovery made available to the class – whether by judgment, settlement, or otherwise – so long as such favorable result is the product of the class litigation," providing further support that article 595(A) does not create a new substantive claim for attorneys' fees. 309 F.3d at 874.

[23] *Cooper, et al. v. Koch Pipeline, Inc., et al.*, 1995 WL 931091, at *2 (E.D. La. 1995) (*abrogated on other grounds by Grant*, 309 F.3d 864).

Similarly, the Louisiana Fifth Circuit Court of Appeals has specifically found that "[a]rt. 595 does not increase the amount of the defendants' potential exposure; this occurs when attorneys' fees are a statutory or contractual element of damages awarded *in addition* to the plaintiff's recovery of actual damages."[24] The Louisiana Supreme Court, however, has not definitively weighed in on the issue. In the absence of definitive authority from Louisiana's highest court interpreting La. CCP article 595, there is no compelling reason for this Honorable Court to revisit the lower courts' conclusion that the Respondents' amendment did not "expose the defendants to a new or additional kind of damages, nor [did] it significantly change the substantive character of the litigation."[25]

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[24] *In re Gas Water Heater Prods. Liab. Litig.*, 697 So.2d 341, 346 (La. App. 5th Cir. 1997) (*overturned on other grounds*, 711 So.2d 264 (La. 1998)) ("LSA-C.C.P. art. 595 is *discretionary*; it does not require the court to award attorneys' fees, nor does it make attorneys' fees a statutory or legal element of damages in a class action when the underlying cause of action does not otherwise provide for attorneys' fees as a statutory element of damages. This article does not create an element of damages for attorneys' fees; rather, art. 595 provides a vehicle whereby the trial court, at its discretion, *may* award the reasonable costs of litigation, including attorneys' fees, to the class representatives when as a result of the class action a fund is made available").

[25] Petition App. at 53a.

C. There is no confusion or conflict among the circuits.

Petitioner contends that "[t]he employment of state law relation-back tests to determine when a civil action was 'commenced' for CAFA removal purposes has caused confusion in district and appellate courts."[26] There is no confusion or conflict among the Circuit Courts in the determination of the commencement date of a lawsuit filed before the enactment of CAFA. In the instant case the Fifth Circuit, consistent with the other Circuit Courts, found that "the date on which a civil action commences is determined by state law."[27] Looking to state law to determine commencement is appropriate considering that in every case where this issue arises, the proceeding will have been initially filed in state court.

Federal courts have also been asked to determine whether post-CAFA amendments to a lawsuit commenced pre-CAFA have so dramatically changed the character of the litigation that the case is commenced anew. In determining whether an amendment re-commences a suit, some federal courts have considered whether the amendment relates back to the original complaint under state law.[28] Petitioner

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[26] Petition at 4.

[27] Petition App. at 12a; *see* cases cited *supra* at note 10.

[28] *Id.* at 22a; *Braud*, 445 F.3d at 806-07; *Hall v. State Farm Mut. Auto. Ins. Co.*, 215 Fed.Appx. 423, 425, 427-28 (6th Cir. 2007); *Plubell*, 434 F.3d at 1071-72; *Prime Care of Northeast Kan., LLC v. Humana Ins. Co.*, 447 F.3d 1284, 1286 (10th Cir.

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contends that this use of state relation-back analysis produces disparate results.[29]

In this instant case, the Fifth Circuit found relation-back analysis "unilluminating"[30] and chose not to rely on it in its affirmation of the District Court's remand order:

> Thus, whether we apply the Louisiana or the federal relation-back analysis to Abshire et al.'s ninth amended complaint, we are convinced that they obviously have not commenced a new 'civil action.' Likewise, when we apply our current default rule under Louisiana law, we are convinced that the ninth amended complaint does not commence a new civil action.[31]

2006); *Santamarina, et al. v. Sears, Roebuck, & Co.*, 466 F.3d 570, 573 (7th Cir. 2006); *Knudsen*, 411 F.3d at 807; *see also Bush*, 425 F.3d at 687.

[29] The Petitioner provides no alternative test under which federal jurisdiction would apply in this case under CAFA. To the extent that Petitioner attacks the federal courts' employment of "state law relation-back" analysis as producing disparate results, it should be noted that the federal relation-back analysis expressly incorporates state law analysis. FRCP 15(c)(1)(A) specifically requires the use of state relation-back law in state law cases to determine when an amendment relates back to the date of the original pleading. Petitioner is essentially asking this Court to reject an effective, widely used rule of law for an undisclosed alternative.

[30] Petition at 5; Petition App. at 18a.

[31] Petition App. at 23a.

The Fifth Circuit did not blindly apply state law relation-back analysis to determine whether the post-CAFA amendment re-commenced the case, as the Petitioner suggests. Quite to the contrary, the Fifth Circuit analyzed the rulings of the other Circuit Courts to ensure that the result in this case was consistent with the developing body of federal jurisprudence on the re-commencement issue – and it is.[32] The Fifth Circuit did not "flatly reject" a relation-back test, as alleged by Petitioners;[33] it merely applied it in the alterative in an effort to preserve uniformity within the Federal Circuit Courts and illustrate the impossibility of CAFA jurisdiction in the instant case under any analysis.[34]

Determination of a second commencement date for removal under CAFA is not contingent on relation-back analysis alone. The issue is whether a new claim was made by the post-CAFA amendment and, if so, whether that new claim was a sufficiently dramatic change to the character of the litigation to cause the

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[32] *Braud*, 445 F.3d at 804 (addition of a new defendant "commences" civil action as to that defendant); *Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d 755, 758 (7th Cir. 2006) (a novel claim expanding the original claim to include all policies issued nationwide by any of the defendant's subsidiaries or affiliates commences new litigation under CAFA); *Plummer v. Farmers Group, Inc.*, 388 F.Supp.2d 1310, 1313, 1316-17 (E.D. Okla. 2005) (addition of thousands of new plaintiffs and two new causes of action constituted *de facto* commencement of new suit).

[33] Petition at 5.

[34] Petition App. at 21a, 23a.

case to have a second commencement date. If no new claim was made under Louisiana law, then there is no need to determine whether a new commencement date occurred.[35] The lower courts correctly found that the Respondents' amendment did not assert a new claim regardless of the interpretation of La. CCP article 595 and remanded the case. Under the analysis employed by all other Circuit Courts that have weighed in on the issue, the result in this case would be the same. There is no compelling reason for this Court to expend its time and effort to attempt to answer an irrelevant question when no confusion or conflicts exist among the Circuits.

D. Answering Petitioners' questions will not affect the outcome of this case.

Even if this Court decides article 595 creates a new state law claim for attorneys' fees as an additional damage claim in Louisiana and that consideration of relation-back tests is inappropriate in the context of determining CAFA commencement dates, federal jurisdiction under CAFA is specifically excluded in this case under two different and distinct mandatory statutory exceptions.[36] Both the State

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[35] In fact, the Fifth Circuit determined that "the concerns balanced by the relation-back doctrine are virtually non-existent in this case." *Id.* at 20a.

[36] These exceptions were not ruled on by any lower court because those courts found the lack of a new commencement date for removal dispositive. *See id.* at 23a; *see also id.* at 29a-30a

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Actor and Local Controversy exceptions are applicable in the instant case and both preclude federal jurisdiction under CAFA.

First, section 1332(d)(5)(A) states that CAFA shall not apply to any class action in which "the primary defendants are States, State officials, or other governmental entities." The Louisiana Department of Insurance and Office of Financial Institutions are the only primary defendants in the instant case; these state actors are the tortfeasors and have liability exposure for the full amount of Respondents' losses.[37] All of the remaining defendants are insurance companies who are merely contractual indemnitors. Their liability is wholly dependent on the liability of the primary defendants and limited by contractual obligations with the State of Louisiana. CAFA jurisdiction is not applicable in the instant case under the State Actor Exception.

Second, under section 1332(d)(4)(A) "[a] district court shall decline to exercise jurisdiction under paragraph (2)" where over two-thirds of the proposed class are from the state of the suit's origin, the

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(Judge Tyson's adoption of Magistrate Judge's Report in its entirety); *see also id.* at 31a-53a (Magistrate Judge Riedlinger found the commencement issue dispositive and did not analyze the statutory exceptions to CAFA).

[37] *See id.* at 38a, *citing Frazier v. Pioneer Arms, LLC*, 455 F.3d 542, 546 (5th Cir. 2006) (internal citations omitted) (primary defendants are those defendants who are the real targets of the lawsuit).

principal injuries occurred in that state, and at least one of the Petitioners' alleged conduct forms a significant basis for the claims asserted. More than two-thirds of the proposed plaintiff class members are citizens of Louisiana, this case was originally filed in Louisiana, and the conduct that gave rise to the claim occurred almost exclusively in Louisiana. The Local Controversy exception of CAFA also precludes federal jurisdiction in the instant case.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the United States Supreme Court deny the Petition for a Writ of *Certiorari* in this case.

Respectfully submitted,

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Thursday, November 9, 2006

Richard P. Lemmler, Jr.
Ethics Advisory Service Committee
601 St. Charles Avenue
New Orleans, LA 70130-3404

RE: Request for Ethical Opinion in connection with Donald W. Abshire, et al. v. Department of Insurance, et al. No. 377,713 c/w 412,265, 19th J.D.C., East Baton Rouge Parish, LA

Dear Mr. Lemmler:

We write to request your assistance regarding an ethical delimma we are currently facing in connection with the above referenced suit. Below you will find a brief description of the case followed by our specific question to you.

In 1991, counsel brought suit against the Louisiana Department of Insurance and Office of Financial Institution on behalf of many individual plaintiffs for conduct that resulted in the loss of millions in life insurance policies, annuities, and corporate notes. The case is not a class action, but instead a consolidated matter which began with over 1,000 individual plaintiffs, and has been reduced over the years to approximately 500. Most individual claims are less than $10,000. In order to manage so many clients' claims, it was determined at the front end that some kind of smaller committee or board would be necessary, as a practical matter. It was initially thought that a committee of plaintiffs, selected by the plaintiffs themselves, should possess a power of attorney for each client's claim in order to make decisions for every client, including the power to settle and release all claims. This reflected the reality that it would otherwise be impossible ever to negotiate a settlement in the case if each settlement offer had to be communicated to and discussed with over a thousand different people. This initial "committee" concept evolved into creation of the PICO/Midwest Action Group, referred to as PMAG, which is a Louisiana not-for-profit corporation whose members, officers and directors are all plaintiffs. Each plaintiff is a member of PMAG, and this arrangement is embodied in each plaintiff's engagement letter with the attorneys.

The Board of Directors of PMAG is thus elected by the plaintiffs themselves to represent their interests. The Board obviously has a fiduciary duty to all their fellow plaintiffs who are members of PMAG. A power of attorney in favor of the PMAG Board, to manage each individual claim, is incorporated into each plaintiff's contract to employ attorneys. Since the inception of this case in 1991, the attorneys have reported directly to the PMAG Board of Directors and taken instructions from them, relying on the fact that all the individual plaintiffs had knowingly delegated their decision-making authority to the PMAG Board. No client has ever objected to this arrangement. The authority for the attorneys to engage in specific settlement negotiations is derived from PMAG corporate resolutions, as adopted by the Board after consultation with trial counsel. Illustrative copies of each such document are attached hereto in redacted format as Exhibit A. PMAG makes independent decisions based on the advice of trial counsel, and its officers and directors. Board members receive no compensation for their service, nor are they affiliated in any way with the attorneys.

After over 15 years of intense litigation, including numerous appellate battles in the First and Third Circuits, the prospect of settlement has arisen. In considering various settlement offers, a question has arisen regarding the continuing power of PMAG to settle and release claims on behalf of the individual plaintiffs. The question that arises is whether or not PMAG may utilize its powers of attorney to settle and

release the claims of the numerous grantors of the powers of attorney. Although this ability has obviously been granted on the face of the individually-executed powers of attorney, it has been suggested to counsel that Professional Rule of Conduct 1.8 (in particular, subsections *g* and *k*) – addressing representation of multiple clients and barring the use of a power of attorney by counsel in the litigation – could be read very broadly to make the use of the PMAG powers of attorney unethical, despite the fact that the attorneys themselves do not hold the powers of attorney. If the PMAG power of attorney is deemed inadequate for these purposes, counsel will be forced to obtain individual signatures and releases from hundreds of individual clients – all of whom have already expressly delegated that power to PMAG to avoid just such a logistical nightmare. In an abundance of caution, the attorneys seek clarification on whether they can continue to rely on the PMAG Board's use of these powers of attorney in providing settlement releases on behalf of the individual PMAG members, all of whom are clients of the attorneys seeking this guidance.

Question Presented: Is it ethical (a) for a client to give a power of attorney to settle and release his claims to a third party organization of which the client is a member, in order to efficiently manage his claim, and (b) for a lawyer to rely on such a power of attorney in negotiating a settlement, including the final release of those claims in settlement? Stated another way, in the circumstances described above, is

it necessary for a lawyer to obtain the individual authorization of each client to release their claims in settlement, in spite of the fact that the client has already delegated the power to release the claim by executing a power of attorney that specifically grants that power to a third party – who is not his attorney and is not controlled by his attorney?

We truly appreciate your assistance with this matter.

With kindest regards,

PERCY, SMITH & FOOTE, LLP

_____

_____

ELIZABETH ERNY FOOTE

Enclosure
DPS/EEF:jdc
418.005

[LOGO]

Ethics Advisory Service Committee
601 St. Charles Avenue
New Orleans, LA 70130-3404
504.566.1600 800.421.5722
Fax: 504.598.6753
LSBA.org

December 18, 2006

Mr. David P. Smith
Ms. Elizabeth Erny Foote
Percy, Smith & Foote, LLP
720 Murray Street
P.O. Box 1632
Alexandria, LA 71309-1632

CONFIDENTIAL

Re: Ethics Advisory Opinion
EASC #: 06-047-3E

Dear Mr. Smith & Ms. Foote:

You have asked for our opinion regarding your professional responsibility under the following circumstances. Your written request states:

- In 1991, counsel brought suit against the Louisiana Department of Insurance and Office of Financial Institution on behalf of many individual plaintiffs for conduct that resulted in the loss of millions in life insurance policies, annuities, and corporate notes. The case is not a class action, but instead a consolidated matter which began with over 1,000 individual plaintiffs, and has been reduced over the years to approximately

500. Most individual claims are less than $10,000. In order to manage so many clients' claims, it was determined at the front end that some kind of smaller committee or board would be necessary, as a practical matter. It was initially thought that a committee of plaintiffs, selected by the plaintiffs themselves, should possess a power of attorney for each client's claim in order to make decisions for every client, including the power to settle and release all claims. This reflected the reality that it would otherwise be impossible ever to negotiate a settlement in the case if each settlement offer had to be communicated to and discussed with over a thousand different people. This initial "committee" concept evolved into creation of the PICO/Midwest Action Group, referred to as PMAG, which is a Louisiana not-for-profit corporation whose members, officers and directors are all plaintiffs. Each plaintiff is a member of PMAG, and this arrangement is embodied in each plaintiff's engagement letter with the attorneys.

- The Board of Directors of PMAG is thus elected by the plaintiffs themselves to represent their interests. The Board obviously has a fiduciary duty to all their fellow plaintiffs who are members of PMAG. A power of attorney in favor of the PMAG Board, to manage each individual claim, is incorporated into each plaintiff's contract to employ attorneys. Since the inception of this case in 1991, the attorneys have reported directly to the PMAG Board of Directors and taken instructions

from them, relying on the fact that all the individual plaintiffs had knowingly delegated their decision-making authority to the PMAG Board. No client has ever objected to this arrangement. The authority for the attorneys to engage in specific settlement negotiations is derived from PMAG corporate resolutions, as adopted by the Board after consultation with trial counsel. Illustrative copies of each such document are attached hereto in redacted format as Exhibit A (see enclosed copies for reference). PMAG makes independent decisions based on the advice of trial counsel, and its officers and directors. Board members receive no compensation for their service, nor are they affiliated in any way with the attorneys.

- After over 15 years of intense litigation, including numerous appellate battles in the First and Third Circuits, the prospect of settlement has arisen. In considering various settlement offers, a question has arisen regarding the continuing power of PMAG to settle and release claims on behalf of the individual plaintiffs. The question that arises is whether or not PMAG may utilize its powers of attorney to settle and release the claims of the numerous grantors of the powers of attorney. Although this ability has obviously been granted on the face of the individually-executed powers of attorney, it has been suggested to counsel that Professional Rule of Conduct 1.8 (in particular, subsections *g* and *k*) – addressing representation of multiple clients and barring the

use of a power of attorney by counsel in the litigation – could be read very broadly to make the use of the PMAG powers of attorney unethical, despite the fact that the attorneys themselves do not hold the powers of attorney. If the PMAG power of attorney is deemed inadequate for these purposes, counsel will be forced to obtain individual signatures and releases from hundreds of individual clients – all of whom have already expressly delegated that power to PMAG to avoid just such a logistical nightmare. In an abundance of caution, the attorneys seek clarification on whether they can continue to rely on the PMAG Board's use of these powers of attorney in providing settlement releases on behalf of the individual PMAG members, all of whom are clients of the attorneys seeking this guidance.

Your Query:

Is it ethical (a) for a client to give a power of attorney to settle and release his claims to a third party organization of which the client is a member, in order to efficiently manage his claims, and (b) for a lawyer to rely on such a power of attorney in negotiating a settlement, including the final release of those claims in settlement? Stated another way, in the circumstances described above, is it necessary for a lawyer to obtain the individual authorization of each client to release their claims in settlement, in spite of the fact that the client has already

delegated the power to release the claim by executing a power of attorney that specifically grants that power to a third party – who is not his attorney and is not controlled by his attorney?

Foremost, we would remind you that our purpose and policies do not permit us to provide advice or opinions on matters of substantive law outside the limited scope of legal ethics. As such, the following remarks will be limited to an analysis of your facts and advice to you regarding your proposed conduct as lawyers based almost entirely upon the Louisiana Rules of Professional Conduct – there is no intent to suggest or imply a substantive legal opinion with respect to the legality and/or viability of the power of PMAG to settle and release claims on behalf of the individual plaintiffs. Additionally, our policies limit our advice to your prospective conduct – we do not intend to suggest or imply an opinion regarding any conduct that may have already occurred or which may already be on-going.

In light of the foregoing, with respect to your specific questions "(a)" [" . . . *Is it ethical (a) for a client to give a power of attorney to settle and release his claims to a third party organization of which the client is a member, in order to efficiently manage his claims* . . . "], that question, as worded, appears to call for an opinion – perhaps even a substantive legal opinion – regarding the conduct of a client, rather than the conduct of a lawyer. Under that reading, we cannot respond to such a question.

With respect to your specific question "(b)" [" . . . *Is it ethical . . . (b) for a lawyer to rely on such a power of attorney (given by the client to a third party organization of which the client is a member in order to efficiently manage his claims) in negotiating a settlement, including the final release of those claims in settlement? . . .* "], we would offer the following:

As you have already noted, Rule 1.8(k) of the Louisiana Rules of Professional Conduct provides that:

> *. . . A lawyer shall not solicit or obtain a power of attorney or mandate from a client which would authorize the attorney, without first obtaining the client's informed consent to settle, to enter into a binding settlement agreement on the client's behalf or to execute on behalf of the client any settlement or release documents. An attorney may obtain a client's authorization to endorse and negotiate an instrument given in settlement of the client's claim, but only after the client has approved the settlement . . .*

The Rule is fairly clear that a lawyer may not obtain (and, therefore, a reasonable assumption would be that the lawyer may not use or act upon) a power of attorney that would permit a lawyer to enter into a binding settlement agreement and/or execute on behalf of the client any settlement or release documents regarding the client's claims without first obtaining the client's informed consent to settle. "Informed consent" is defined generally by Rule 1.0(c) as " *. . . the agreement by a person to a proposed course of*

conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." The client's "informed consent to settle", then, would be the client's agreement to a proposed settlement after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed settlement. In short, Rule 1.8(k) does not permit a lawyer to get advance written authority from a client to enter into a binding settlement agreement and/or execute on behalf of the client any settlement or release documents while skipping the need to obtain the client's informed consent to the actual settlement terms, risks and alternatives. While the rule does permit the lawyer to obtain authorization from the client to endorse and negotiate an instrument given in settlement of the client's claim, that authority is still conditioned upon first obtaining the client's informed consent to settle (" . . . *only after the client has approved the settlement* . . . ").

Rule 1.8(g) applies this same principal (i.e., that a lawyer cannot contractually avoid/by-pass the need to obtain a client's informed consent to settle at the time of actual settlement) to the situation where a lawyer might be faced with an aggregate settlement of claims while simultaneously representing more than one client with respect to their individual claims in the matter:

> *. . . A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in writing signed by the client, or a court approves a settlement in a certified class action. The lawyer's disclosure shall include the existence and nature of all claims or pleas involved and of the participation of each person in the settlement . . .*

In essence, a lawyer may not settle the potentially-competing claims of multiple clients simultaneously represented by the lawyer without getting the informed consent in writing, signed by each client involved, and that written informed consent must disclose the existence and nature of all claims involved and the participation of each person in the settlement. As already noted above, Rule 1.8(k) would preclude the lawyer from attempting in advance to obtain the clients' authority to enter into a binding settlement agreement and/or to execute any settlement or release documents regarding the clients' individual claims without first obtaining their informed consent to settle. Rule 1.8(g) recognizes the logistical difficulties that might be encountered by a lawyer simultaneously representing a large number of clients when faced with the prospect of obtaining informed consent to settle and, as a result, creates a limited special exception allowing the lawyer to obtain court

approval of an aggregate settlement of the clients' claims but only in a certified class action.

In conclusion – and to answer your final question – we believe the Louisiana Rules of Professional Conduct would obligate you to obtain the individual authorization of each client to release their respective claims in settlement, in spite of the fact that the client may have already attempted to delegate the power to release the claim by executing a power of attorney that specifically grants that power to a third party – who is not his attorney and is not controlled by his attorney. We believe Rule 1.8(k) and Rule 1.8(g) would not allow you to get advance authority from a client permitting you alone, as lawyer, to enter into a binding settlement agreement and/or to execute any settlement or release documents regarding the client's individual claims without first obtaining the client's informed consent to settle. As you simultaneously represent approximately five hundred individual claimants and this is not a certified class action, we believe Rule 1.8(g) would obligate you to obtain the informed consent to settle from each client, in a writing signed by the client, where that written consent would contain disclosures including the existence and nature of all claims involved and of the participation of each person in the settlement. As additional support of this view, we also enclose a copy of a recent opinion issued by the ABA on this topic – ABA Formal Opinion 06-438.

The Ethics Advisory Service provides this response to your inquiry subject to our Statement of Purpose and Policy.

Sincerely,

/s/ Richard P. Lemmler, Jr.
Richard P. Lemmler, Jr.
Ethics Counsel
For the Committee

RPLJr/dcl
Enclosure(s): (2)

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Admitted in Texas

*A Professional Law Corporation;
Also admitted in Tennessee

Thursday, August 2, 2007

VIA Facsimile and U.S. Mail

Honorable Kay Bates
222 St. Louis Street
776 Governmental Building
Baton Rouge, LA 70802

RE: *Donald W. Abshire, el al. v. Department of Insurance, et al.*
No. 377,713 c/w 412,265; 19th J.D.C., State of Louisiana

Dear Judge Bates:

I am writing on behalf of all counsel for the Plaintiffs in the referenced case. We have heard that the Court is considering a *sua sponte* continuance of the September trial in this matter to allow additional time for the parties to discuss settlement. While we

feel that an imminent trial date is a critical motivation for settlement discussion, additional time alone will not promote this goal without action from the court to resolve the authority/representation issues that have heretofore impeded amicable resolution.

For more than a year, Plaintiffs have been diligently working to resolve issues that have hampered the parties' ability to conduct meaningful settlement discussions and/or mediation. These efforts have led us to the conclusion that class certification is the *only recognized process* that will: (1) prevent a large number of Plaintiffs from being unrepresented in this matter; (2) allow Plaintiffs' counsel to speak with one authorized voice in settlement discussions; (3) allow for the possibility of final resolution of all claims; (4) allow the Defendants to secure adequate releases for all Plaintiffs in the event of settlement; and (5) avoid taxing judicial resources with an unnecessary (and legally unfounded) open court "polling" of the Plaintiffs.

This conclusion is confirmed by an opinion from the Louisiana State Bar Association Ethics Advisory Service Committee, which states in pertinent part: "Rule 1.8(g) recognizes the logistical difficulties that might be encountered by a lawyer simultaneously representing a large number of clients when faced with the prospect of obtaining informed consent to settle and, as a result, creates a limited special exception allowing the lawyer to obtain court approval of an aggregate settlement of the clients' claims <u>but only in a certified class action</u>."

As the Court is aware, late last year we were informed that the powers of attorney executed by the Plaintiffs in favor of the PMAG Board of Directors, which we had anticipated would allow for full and complete resolution, could no longer be relied on for that purpose. In the process of firming up the communication path needed to facilitate settlement discussions and trial preparations on an individual basis for over 500 clients, it became clear that we lacked adequate communication to conduct settlement discussions, or prepare for trial, for many of our clients. As it stands, we cannot entertain settlement offers unless we have specific authority from each client. As a result, we were compelled by the rules of professional conduct to move to withdraw as counsel for many of the Plaintiffs, and there is a motion to withdraw as counsel of record pending with the court. If the motion to withdraw is denied – as some Defendants prefer – and a class is not certified – as some Defendants will promote – Plaintiffs' counsel still will not be able to obtain the consent needed to conduct settlement discussions for those identified Plaintiffs. *In that case, a full trial on the merits will remain the only avenue to resolution and any continuance of the current trial date will be a fruitless act.*

Counsel for the Plaintiffs fully appreciates that Your Honor does not want to have hundreds of unrepresented parties in this matter. Like the Defendants, we have considered every conceivable option to cure the problems time has created. After a far reaching search it appears clear that class

certification is the only process set out in the Code of Civil Procedure to deal with the novel issues before this Court.

Some Defendants have suggested that the court order the Plaintiffs into court to "demonstrate" their willingness to proceed, in default of which their claims would be dismissed. Setting aside for now the fact that there is no statutory justification for such an order and that the process envisioned by the Defendants conflicts with the recent ruling of the First Circuit, as a practical matter, this "solution" solves nothing. Plaintiffs counsel will still be unable to meaningfully participate in settlement discussions if we have to communicate every offer (and obtain authorization for every counter offer) to hundreds of people. And the Defendants will remain hesitant to engage in meaningful settlement discussions while the ultimate fate of those Plaintiffs dismissed for failing to "check-in" works through the appellate system. In short, we have seen over the last year that anything short of class certification is fraught with delay and complexity that only serves to make settlement discussion a tool for delay.

Another option discussed would be to grant Plaintiffs counsel's motion to withdraw and appoint a curator to represent the unrepresented parties. Plaintiffs are open to discussing this option. But like the roll call approach above, we find no specific legal authority to support this option and it would not resolve the logistical difficulties in negotiating settlement. We strongly believe the class approach is the

only viable way to achieve the Court's objectives of efficient case management within the confines of the Code of Civil Procedure.

We bring these items to the Court's attention in order to make the August 6, 2007 status conference meaningful. We appreciate your attention to this matter and look forward to discussing the options available at the status conference on Monday.

Respectfully,

PERCY, SMITH & FOOTE, LLP

/s/ David C. Raphael, Jr.
DAVID C. RAPHAEL, JR.

DCR/ap

cc: All Counsel of Record (See attached list)

DEFENDANTS' UNSUCCESSFUL ATTEMPTS TO SEEK STATE APPELLATE REVIEW OR FEDERAL FORUM
DEFENDANTS' FEDERAL REMOVAL ATTEMPTS
09-08-2001 Removal to USDC, Middle Dist. La. 01-cv-00781 **11-20-2001** USDC, Middle Dist. La. remands matter to State court
06-20-2008 Removal to USDC, Middle Dist. La. 08-cv-00369 **12-30-2008** USDC, Middle Dist. La. remands matter to State Court **01-15-2009** Defendants file appeal with USCA, 5th Circuit 09-30121 **07-02-2009** USCA, 5th Circuit affirms the District Court's remand to State Court

(continued on next page)

DEFENDANTS' FAILED STATE WRIT APPLICATIONS

FILED BY DEPT. OF INS. ("DOI") & OFFICE OF FINAN. INSTITUTIONS ("OFI")

11-22-2000 La. 1st Cir., 2000-CW-2693
06-01-2001 La. Sup. Ct., 2001-CC-1586

FILED BY DOI

05-09-2001 La. 1st Cir., 2001-CW-0958

FILED BY DOI & OFI

07-03-2001 La. 1st Cir., 2001-CW-1525

FILED BY DOI & OFI

06-18-2003 La. 1st Cir., 2003-CW-1248

FILED BY ADMIRAL INS. CO.

05-05-2004 La. 1st Cir., 2004-CW-1002
10-27-2004 La. Sup. Ct., 2004-CC-2659

FILED BY DOI & OFFICE OF RISK MGMT. SELF INS. FUND

05-05-2004 La. 1st Cir., 2004-CW-1005
10-27-2004 La. Sup. Ct., 2004-CC-2672

FILED BY OFI

05-18-2004 La. 1st Cir., 2004-CW-1103
10-27-2004 La. Sup. Ct., 2004-CC-2656

FILED BY NATIONAL UNION FIRE INS. CO. OF PITTSBURGH, PA

05-19-2004 La. 1st Cir., 2004-CW-1122
10-27-2004 La. Sup. Ct., 2004-CC-2658

FILED BY LEXINGTON INS. CO.

05-19-2004 La. 1st Cir., 2004-CW-1124
10-27-2004 La. Sup. Ct., 2004-CC-2657

FILED BY WESTCHESTER FIRE INS. CO.

05-19-2004 La. 1st Cir., 2004-CW-1171
10-27-2004 La. Sup. Ct., 2004-CC-2670

FILED BY AM. EXCESS INS. ASSN.

05-19-2004 La. 1st Cir., 2004-CW-1132
10-26-2004 La. Sup. Ct., 2004-CC-2650

FILED BY DOI

03-30-2005 La. 1st Cir., 2005-CW-0626
03-30-2005 La. 1st Cir., 2005-CW-0627
07-15-2005 La. Sup. Ct., 2005-CC-1903
07-15-2005 La. Sup. Ct., 2005-CC-1894

FILED BY OFI

05-31-2005 La. 1st Cir., 2005-CW-1131

FILED BY ADMIRAL INS. CO.

04-16-2008 La. 1st Cir., 2008-CW-0751

ABSHIRE VS. STATE OF LOUISIANA

NO.: 09-30121

U.S. COURT OF APPEALS, 5TH CIRCUIT
RECORDING OF ORAL ARGUMENT
AS PROVIDED BY U.S. 5TH CIRCUIT
COURT OF APPEALS
At http://www.
ca5.uscourts.gov/OralArgumentRecordings.aspx

04/28/09

* *

The following typewritten matter was transcribed by
Gia Mangiaracina, Certified Court Reporter.

* *

M & S COURT REPORTERS
318-443-8759

[2] INDEX

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BY MR. DAVIS LATHAM 11, 44
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EXHIBITS:..... NONE

* * *

[40] JUDGE: Let me ask you a question.

MR. DUNLAP: Yes, sir.

JUDGE: What's the principal thrust of the state wanting to be in federal court?

MR. DUNLAP: [41] That's a good question, Your Honor.

JUDGE: I ask you that question because we've had a number of CAFA cases filed in our court that are post-Katrina related claims, starting with Preston Weems, and also –

MR. DUNLAP: Allstate. AAA.

JUDGE: – Allstate, I mean, several of them I've had the whatever fortune of having to wrestle with a number of these. And at least two of them in which the plaintiffs sought to invoke CAFA and the state, represented by the Attorney General, invoked sovereign immunity. And the notion of the claims being brought under params padre that to writ to stay in state court.

So, I'm not suggesting that one has to have a consistent litigation strategy, you know, across the board. But at least does strike me that in many of the post-Katrina cases at least the state has had a fairly consistent position to want to be in state court to litigate the road home post-Katrina insurance cases, they inserted antitrust as things by the new attorney general in a variety of claims. So, it's not [42] an inappropriate question, I just want to know. I mean, is there –

MR. DUNLAP: Yes, sir.

JUDGE: – something unique about this set of claims, putting aside the merit of them, that warrant being in federal court versus being in state court

where the state seems to want sort of a consistent theme with the cases.

MR. DUNLAP: Well, the consistent theme for the attorney general, is that, that he wants to be in a forum that is in the best interest of the citizens of Louisiana. And he has the authority to determine which forum is in the best interest of the citizens of Louisiana.

We want to be in federal court, because over the years of this litigation the state courts at every level, supreme, first circuit and district court, have refused to apply the res judicata effect of state versus public investors.

I stood in this court in 1994 and argued before Judge Wisdom in that case representing the Department of Insurance under the same transaction and occurrences that form the basis of this lawsuit. We [43] have urged res judicata and collateral estoppel at every turn and we're told that it's not applicable.

We filed an all writs action in the Middle District – I'm sorry, in the Western District of Louisiana asking the court to enforce the judgment of the State versus Gust against these plaintiffs who had claims in both litigation, and won that case. And, that's part of the record. That was a action brought under the re-litigation exception to the anti-injunction statute.

We want to be in federal court so that a federal tribunal, a federal judge will apply the State versus Gust holding to the facts of this case. Judge Bates,

the State District Judges refused to, and on every writ application for every amended petition that they filed we've asked the state courts to apply federal concepts of res judicata which they have refused.

Judge Drell in Alexandria did so and enjoined a good hunk of these plaintiffs from pursing certain of their claims which were at issue in that – in the State versus Public Investors Litigation. So, that's –

JUDGE: Excuse me. So, you want the federal court to give you some state-court relief that the state courts [44] won't give you?

MR. DUNLAP: That's exactly right, Your Honor. And Judge Bates has consistently signaled to these plaintiffs that she's going to certify this class, and that's why we're here.

JUDGE: This reminds of some days in distant past which I shall not allude to further of what they were.

JUDGE: Thank you, Mr. Dunlap. And Mr. Latham.

* * *

[48] CERTIFICATE

STATE OF LOUISIANA

PARISH OF RAPIDES

I, Gia Mangiaracina, Certified Court Reporter did not record, but only transcribed to the best of my ability the foregoing 47 pages of the Oral Argument.

I FURTHER CERTIFY that I am not related to any of the parties in this suit, am not of counsel for any of them, and have no financial interest in the outcome hereof.

IN WITNESS WHEREOF, I have hereunto affixed my signature at Alexandria, Louisiana, this 19th day of October, 2009.

/s/ Gia Mangiaracina
Gia Mangiaracino, CCR, #94081

[SEAL]

28 U.S.C.A. § 1332

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection –

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which –

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of –

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2) –

(A)(i) over a class action in which –

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant –

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the

primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which –

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim –

(A) concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2] and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

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[1] So in original. Reference to "16(f)(3)" probably should be preceded by "section".

[2] So in original. Probably should be "77p(f)(3)".

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which –

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be

transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply –

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Pub. L. 109-2, 2005, 119 Stat. 4

SEC. 9. EFFECTIVE DATE

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.

Approved February 18, 2005.

PL 109-2, 2005 S 5

Federal Rule of Civil Procedure

Rule 15. Amended and Supplemental Pleadings

[Text of subdivision (a) effective until December 1, 2009, absent contrary Congressional action.]

(a) Amendments Before Trial.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course:

(A) before being served with a responsive pleading; or

(B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.

[Text of subdivision (a) effective December 1, 2009, absent contrary Congressional action.]

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) ***Based on an Objection at Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in

presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) ***For Issues Tried by Consent.*** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is

satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) ***Notice to the United States.*** When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) **Supplemental Pleadings.** On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Federal Rule of Civil Procedure

Rule 23. Class Actions

(a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or

impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a

class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) ***In General.*** In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require – to protect class members and fairly conduct the action – giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

[*Text of subdivision (f) effective until December 1, 2009, absent contrary Congressional action.*]

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying

class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

[*Text of subdivision (f) effective December 1, 2009, absent contrary Congressional action.*]

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Louisiana Code of Civil Procedure article 595

West's Louisiana Statutes Annotated Currentness
Louisiana Code of Civil Procedure Acts 1960, No. 15 (Refs & Annos)
Book I. Courts, Actions, and Parties
Title II. Actions
View the full text of all sections at this level Chapter 5. Class And Derivative Actions (Refs & Annos)
View the full text of all sections at this level Section 1. Class Actions

Art. 595. Award of expenses of litigation; security for costs

A. The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

B. The court, on contradictory motion at any stage of the proceeding in the trial court prior to judgment, may require the plaintiff in a class action to furnish security for the court costs which a defendant may be compelled to pay. This security for costs may be increased or decreased by the court, on contradictory motion of any interested party, on a showing that the security furnished has become inadequate or excessive.

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA CODE OF CIVIL PROCEDURE
BOOK I. COURTS, ACTIONS, AND PARTIES
TITLE II. ACTIONS
CHAPTER 5. CLASS AND DERIVATIVE ACTIONS
SECTION 1. CLASS ACTIONS

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LOUISIANA STATUTES ANNOTATED

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CODE OF CIVIL PROCEDURE
BOOK I. COURTS, ACTIONS, AND PARTIES
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Louisiana Code of Civil Procedure article 421
West's Louisiana Statutes Annotated Currentness
Louisiana Code of Civil Procedure Acts 1960, No. 15 (Refs & Annos)
Book I. Courts, Actions, and Parties
Title II. Actions
Chapter 1. General Dispositions (Refs & Annos)

Art. 421. Civil action; commencement; amicable demand unnecessary

A civil action is a demand for the enforcement of a legal right. It is commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction. Amicable demand is not a condition precedent to a civil action, unless specifically required by law.